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Federal Communications Commission
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

THE TENNIS CHANNEL, INC.

v.

COMCAST CABLE COMMUNICATIONS, LLC

To: The Commission

)
)
) MB Docket No. 10-204
) File No. CSR-8258-P
)
)

FILED/ACCEPTED

FEB 14 2012

Federal Communications Commission
Office of the Secretary

**OPPOSITION TO MOTION FOR ACCEPTANCE OF COMCAST'S REPLY, OR
IN THE ALTERNATIVE, REQUEST FOR LEAVE TO FILE SURREPLY**

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February 14, 2012

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Opposition

The Tennis Channel, Inc. (“Tennis Channel”) respectfully requests that the Commission deny Comcast Cable Communications, LLC’s (“Comcast’s”) request to file a reply brief supporting its stay petition.¹ The Commission’s rules disfavor replies, expressly stating that replies to oppositions to stay requests “should not be filed and will not be considered.”² That rule is especially applicable where the proposed reply merely seeks to reargue issues that Comcast already raised and discussed in its conditional petition for stay and in its opposition to Tennis Channel’s petition to compel compliance.³ While Comcast claims that it seeks to make new arguments, its proposed reply does nothing more than take issue with Tennis Channel’s responses to Comcast’s own arguments; if such disagreements justified a reply, replies in support of stay requests would be available in all instances and not disfavored. Because Comcast’s reply would add nothing new, it should not be accepted.

In the alternative, Tennis Channel asks that, if Comcast’s reply is accepted, Tennis Channel be allowed to file a surreply (attached hereto as Exhibit A). To the extent the Commission agrees with Comcast that further discussion of the points addressed in prior briefing is helpful, Tennis Channel’s clarifications of points that Comcast has tried to obscure or has omitted will also be helpful and will assist the Commission in its analysis.

¹ Comcast’s Reply to Tennis Channel’s Opposition to Comcast’s Conditional Petition for Stay (Feb. 10, 2012) (attached as Ex. A to Motion for Acceptance of Comcast’s Reply to Tennis Channel’s Opposition to Comcast’s Conditional Petition for Stay, at 1 (Feb. 10, 2012)).

² 47 C.F.R. § 1.45(d). Similarly, the rules for interlocutory actions in hearing proceedings state that “replies to oppositions will not be entertained.” *Id.* § 1.294(b).

³ See Comcast’s Conditional Petition for Stay (Jan. 25, 2012); *see also* Opposition to Tennis Channel’s Petition to Compel Comcast’s Compliance with Initial Decision, at 9-12 (Jan. 25, 2012) (putting forward argument based on the Administrative Procedure Act).

Respectfully submitted,



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In the Matter of)	
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THE TENNIS CHANNEL, INC.)	MB Docket No. 10-204
)	File No. CSR-8258-P
v.)	
)	
COMCAST CABLE COMMUNICATIONS, LLC)	
To: The Commission		

SURREPLY TO COMCAST’S CONDITIONAL PETITION FOR STAY

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Surreply

Comcast's reply adds no new argument justifying a stay, leaving untouched Tennis Channel's showing that the prompt compliance contemplated by Section 616, the Commission's rules, the Hearing Designation Order, and the Initial Decision is appropriate.

I. The Remedy Ordered In The Initial Decision Became Effective Upon Release, And The Administrative Procedure Act Does Not Require Otherwise.

In its pleading, Comcast again argues that Section 10(c) of the Administrative Procedure Act (APA) invalidates Sections 76.10 and 76.1302 of the Commission's Rules, which make an Initial Decision resolving a program carriage complaint effective upon release.¹ But the APA provides no support for Comcast's effort to evade the lawful order issued by the Chief Administrative Law Judge (ALJ). Section 10(c) relates only to when or whether an agency action is subject to judicial review. Despite Comcast's effort to stretch the provision beyond its express terms, it does not limit the Commission's ability to make an Initial Decision immediately effective.²

Comcast, however, appears to suggest that Section 10(c) somehow "forbids" the effectiveness upon release of an ALJ's Initial Decision unless an applicable federal statute requires administrative exhaustion prior to judicial review.³ That is not the correct reading of

¹ See 47 C.F.R. §§ 76.10(c)(2), 76.1302(g)(1) (as in effect when this case began).

² See 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . . Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application [for an appeal to superior agency authority] . . . , unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative.").

³ Comcast's Reply to Tennis Channel's Opposition to Comcast's Conditional Petition for Stay, at 1 (Feb. 10, 2012) (attached as Ex. A to Motion for Acceptance of Comcast's Reply to Tennis Channel's Opposition to Comcast's Conditional Petition for Stay, at 1 (Feb. 10, 2012)) [hereinafter "Reply to Opposition"].

Section 10(c), which suggests only that there may be situations in which an agency decision to make a delegated or initial order effective upon release would give rise to an immediate right of judicial review.⁴ But assuming *arguendo* that Comcast's view of Section 10(c) were correct, the Initial Decision in this case is in fact subject to a statutory exhaustion requirement, which even on Comcast's interpretation renders this APA provision inapplicable.⁵ The Communications Act specifically provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission"⁶ must be brought under 28 U.S.C. § 2342, which extends the jurisdiction of U.S. Courts of Appeals only to the review of "*final orders*" of the Commission."⁷ Since the Initial Decision remains subject to Commission review, it does not "mark the 'consummation' of

⁴ As stated in the Supreme Court ruling upon which Comcast relies, the recourse — if any — available to a party subject to an immediately effective agency action subject to further administrative review would be a request for judicial review: "Agencies may avoid the finality of an initial decision, first, by adopting a rule that an agency appeal be taken before judicial review is available, and, second, by providing that the initial decision would be 'inoperative' pending appeal. *Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review.*" *Darby v. Cisneros*, 509 U.S. 137, 152 (1993) (emphasis added). Here, however, as discussed above, the Communications Act makes judicial review unavailable until the Commission has completed its review.

⁵ With respect to the Hearing Designation Order (HDO), the Communications Act expressly provides that "[t]he filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under [47 U.S.C. § 155(c)(1)]." 47 U.S.C. § 155(c)(7).

⁶ 47 U.S.C. § 402(a). This provision creates an exception for orders "appealable under [47 U.S.C. § 402(b)]," *id.*, but such orders do not include the Initial Decision at issue here.

⁷ 28 U.S.C. § 2342(1) ("The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all *final orders* of the Federal Communications Commission made reviewable by section 402(a) of title 47 . . .") (emphases added).

Given the statutory exhaustion requirements applicable to the Initial Decision, Comcast's efforts to distinguish *Committee to Save WEAM v. FCC*, 808 F.2d 113 (D.C. Cir. 1986), and *Cablevision Systems Corp. v. FCC*, No. 11-4104, Order, Doc. 86 (2d Cir. Nov. 9, 2011); *id.*, Opposition of FCC to Emergency Request for a Stay Pursuant to the All Writs Act, Doc. 51 (Oct. 20, 2011), from this case necessarily fail. In those cases, both the courts and the Commission confirmed that Commission rules expressly making agency orders effective upon release (as the Commission's Rules provide here) are valid.

the agency's decisionmaking process" that is required to make it final and reviewable in court within the meaning of the APA, the Communications Act, and 28 U.S.C. § 2342.⁸ Thus, while the Commission's review is pending, the Initial Decision may be effective even if it is not a final agency action subject to judicial review.⁹

In sum, on Comcast's own theory of Section 10(c) of the APA, which assertedly makes the existence of a *statutory* exhaustion requirement "the only relevant question,"¹⁰ the exercises of agency authority involved here — and Sections 76.10 and 76.1302 of the Commission's Rules — are well within the Commission's authority.

II. Comcast's New Evidence Could and Should Have Been Introduced At Trial.

As Comcast concedes, the HDO "made clear that the merits of Tennis Channel's claim, including the appropriate remedy, would be before the ALJ."¹¹ Despite Comcast's efforts to suggest that its newly filed declarations do not relate to its "challenges to the Initial Decision on the merits,"¹² that is just what they do: they seek to argue that the remedy ordered in the Initial Decision — one of the issues expressly designated for hearing — is unduly burdensome to Comcast. Comcast had the opportunity to make this point at the hearing, when its witnesses

⁸ *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see also Franklin v. Massachusetts*, 505 U.S. 788, 796-97 (1992); *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001). In these circumstances, simultaneous review by the courts would be inefficient and inappropriate. *See Wade v. FCC*, 986 F.2d 1433, 1434 (D.C. Cir. 1993) (per curiam); *see also Puget Sound Energy, Inc. v. United States*, 310 F.3d 613, 624-25 (9th Cir. 2002); *Int'l Telecard Ass'n v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999).

⁹ Comcast cites no authority purporting to limit the ability of Congress, as distinct from agencies or courts, to require exhaustion. The authorities on which it relies apply only where there is no statutory exhaustion requirement, as there is here. *See Darby*, 509 U.S. at 138, 152-54; *Attorney General's Manual on the Administrative Procedure Act*, ch. IX, § 10, at 93, 103-05 (1947).

¹⁰ Reply to Opposition at 5.

¹¹ *Id.* at 6.

¹² *Id.*

could have been subject to cross-examination. It chose to waive that opportunity, and having made that choice, should not be allowed to introduce new evidence that cannot fairly be tested.

III. Comcast Makes No Showing That Compliance Would Unduly Burden It Or The Public.

Comcast — on which the burden rests to show, among other things, that it would suffer irreparable injury absent a stay and that a stay would serve the public interest — has shown neither.

Notably, Comcast does not argue in its submission that it would face a material burden if it were required to distribute Tennis Channel to more homes. This is presumably because of the incontrovertible evidence from its own files that it has surmounted the claimed obstacles regularly and apparently easily, when it has wanted to do so.¹³

Instead, Comcast devotes its arguments to its claim that changing channel placement is burdensome. As to that issue, Comcast acknowledges the examples Tennis Channel noted of channel lineups in which it would appear to have room and flexibility to make adjustments, but suggests it still may be unable to make adjustments with “ease and simplicity.”¹⁴ But Comcast still has offered no specific evidence that it cannot comply, despite having had the opportunity to do so at the hearing. For it to attempt to avoid compliance now through self-serving statements that have not been fully substantiated, and that were not subject to testing or cross-examination at the hearing, would be both unfair and would undermine the Commission’s ability to further the goals of Section 616.¹⁵

¹³ See Opposition to Comcast’s Conditional Petition for Stay, Section II.B.2 (Feb. 6, 2012).

¹⁴ Reply to Opposition at 8.

¹⁵ On January 9, 2012, Comcast told Tennis Channel representatives that it would gather and share information about its plans for compliance and any related challenges. It has yet to do so.

Ultimately, as the Enforcement Bureau noted, Comcast's lack of a showing of meaningful harm, coupled with the goals of Section 616, require rejection of Comcast's stay request:

[T]here is no merit to Comcast's claim that frustration and confusion among its viewers supports a stay of the [Initial Decision]. Whether there would be any such confusion or frustration at all is speculative, given that cable companies modify their channel lineups with relative frequency. Additionally, even assuming, *arguendo*, that Comcast's viewers were inconvenienced, any such difficulty would be temporary at best. Any short-term disruption that Comcast viewers might experience is outweighed by the long-term benefits they would enjoy from the diversity in programming brought about by implementing the [Initial Decision].¹⁶

The Enforcement Bureau correctly and forcefully observed that "[i]f anything is to be drawn from the[] collective voice [of Congress and the Commission], it is that where a cable carrier has been found to have engaged in affiliation-based discrimination, the public interest manifestly requires an immediate remedy."¹⁷

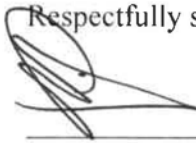
CONCLUSION

For the reasons set forth above and in Tennis Channel's Opposition to Comcast's Conditional Petition for Stay, the Commission should deny Comcast's Conditional Petition for Stay and order Comcast to comply fully and promptly with the Initial Decision.

¹⁶ Enforcement Bureau's Comments on Conditional Petition for Stay, at 3 (Feb. 6, 2012); *see also id.* ("A stay of the [Initial Decision] would serve only Comcast's pecuniary interests.").

¹⁷ *Id.*

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February 14, 2012

CERTIFICATE OF SERVICE

I, Leah E. Pogoriler, hereby certify that on this 14th day of February, 2012, I caused a true and correct copy of the foregoing Opposition to Motion For Acceptance of Comcast's Reply, Or in The Alternative, Request For Leave To File Surreply to be served by electronic mail upon:

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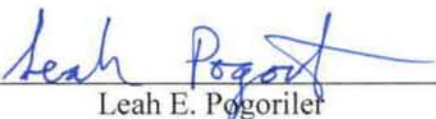
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